



Signed: November 03, 2009

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
LESLIE PATRICE BARNES MARKS,
Debtor.

No. 09-46608 TG
Chapter 13

LESLIE PATRICE BARNES MARKS,
Plaintiff,

A.P. No. 09-4307 AT

vs.

OCWEN LOAN SERVICING, LLC,
Defendant.

MEMORANDUM OF DECISION

Defendant Ocwen Loan Servicing, LLC ("Ocwen") moved to dismiss the first amended complaint (the "Complaint") in the above-captioned adversary proceeding pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. The motion was opposed by the plaintiff Leslie Patrice Barnes Marks (the "Debtor"). The Debtor filed a motion for leave to file a second amended complaint

1 and a proposed second amended complaint. Ocwen filed an opposition
2 to the Debtor's motion. The motions came on for hearing on October
3 8, 2009. Appearances were stated on the record. At the conclusion
4 of the hearing, the Court took the motions under submission. Having
5 considered the evidence presented and argument made, for the reasons
6 stated below, the Court concludes that Ocwen's motion should be
7 granted and that the Debtor's motion should be denied.

8 **SUMMARY OF FACTS AND PROCEDURAL HISTORY**

9 On July 23, 2009, the Debtor filed a petition seeking relief
10 under chapter 13 of the Bankruptcy Code, thereby commencing the
11 above-captioned case. On the same day, she filed a complaint against
12 Ocwen, thereby commencing this adversary proceeding. She filed an
13 amended complaint (i.e., the Complaint) on July 28, 2009. On August
14 19, 2009, Ocwen filed a timely motion to dismiss the Complaint on the
15 ground that the claims asserted therein were barred by res judicata.
16 On September 2, 2009, the Debtor filed a motion for leave to file a
17 second amended complaint and a proposed second amended complaint.
18 Both motions were opposed.

19 The Complaint concerns a secured claim (the "Secured Claim")
20 encumbering the Debtor's real property (the "Property"). The
21 Complaint begins with a series of factual allegations, i.e., that
22 Ocwen acquired the Secured Claim fraudulently, that it unlawfully
23 charged the Debtor late fees, that it never serviced the Secured
24 Claim, that it threatened to foreclose on the Property without any
25 right to do so, that it harassed the Debtor and made false
26 representations to her in an attempt to acquire the Property, that it

1 has failed to provide the original note to prove it is the holder,
2 that it has made false reports to credit bureaus that the loan is in
3 "good standing," that it has failed to place insurance on the
4 Property, and that it has refused to provide the Debtor with monthly
5 statements.

6 The Complaint asserts three claims for relief, which incorporate
7 the above factual allegations by reference: (1) fraud and
8 misrepresentation, (2) fraudulent transfer, and (3) quiet title. The
9 claim for fraud and misrepresentation alleges that Ocwen engaged in
10 actions and made representations that were false and fraudulent and
11 were intended to induce the Debtor to convey title to the Property to
12 Ocwen and upon which she relied. The nature of the actions and
13 representations is not specified except by reference to the factual
14 allegations described above.

15 The claim for fraudulent transfer alleges that Ocwen has
16 unlawfully attempted to convert the Property to its own use based on
17 false and fraudulent representations, despite the fact that the
18 Debtor has rescinded the loan. As a result of the rescission, the
19 Debtor alleges, Ocwen's claim has become wholly unsecured. The claim
20 for quiet title alleges that the Debtor owns fee title to the
21 Property. The prayer asks the Court to determine that Ocwen has no
22 claim against the Property, to strip off the unsecured portion of
23 Ocwen's lien, to ensure that the Debtor suffers no liability as a
24
25
26

1 result of the lien stripping, and to order Ocwen to remove all
2 derogatory credit references from the three credit bureaus.¹

3 Ocwen's motion to dismiss asserts that these claims are barred
4 by res judicata. Ocwen asserts that, in 2007, the Debtor filed a
5 complaint against Ocwen in the United States District Court for the
6 Northern District of California (the "District Court Action"). The
7 complaint in the District Court Action involved the same facts and
8 asserted similar legal claims based on those facts. The District
9 Court gave the Debtor several opportunities to amend the complaint to
10 state a viable claim against Ocwen before dismissing the District
11 Court Action with prejudice on April 10, 2009. The Debtor did not
12 appeal the dismissal order.

13 Ocwen's motion is supported by a Request for Judicial Notice
14 (the "RJN") to which are attached copies of the following documents
15 filed in the District Court Action: (1) the Debtor's Second Amended
16 Complaint in the District Court Action (the "Second Amended District
17 Court Complaint"), (2) the District Court's Order granting Ocwen's
18 motion for judgment on the pleadings, and (3) the District Court's
19 Judgment dismissing the Second Amended District Court Complaint with
20 prejudice. The Second Amended District Court Complaint asserted six
21 claims as follows: (1) Fraud/Intentional Misrepresentation, (2)
22

23 ¹The Debtor's motion for leave to file a second amended
24 complaint in the bankruptcy court seeks to add DB Structured
25 Products ("DB") as an additional defendant. DB was also a
26 defendant in the District Court Action. The proposed second
amended complaint (the "Second Amended Bankruptcy Court Complaint")
lists five claims: (1) violation of RESPA, (2) conversion, (3)
unjust enrichment, (4) negligence, and (5) intentional infliction
of emotional distress.

1 Negligent Misrepresentation, (3) Negligence/Professional Malpractice,
2 (4) Violation of Truth in Lending Act, (5) Violation of Real Estate
3 Settlement Procedures Act, and (6) Violation of Business and
4 Professions Code § 17200 et seq.

5 The key factual recitals in the Second Amended District Court
6 Complaint alleged that, in December 2005, the Debtor was induced by
7 a brokerage subsidiary of New Century Mortgage Corporation ("New
8 Century") to replace the existing mortgage on the Property with a new
9 mortgage in favor of New Century--i.e., the Secured Claim--by false
10 representations as to the interest rate and monthly payments. In
11 2006, the Debtor filed a lawsuit against New Century based on these
12 misrepresentations. However, the lawsuit was stayed when New Century
13 filed for bankruptcy in April 2007.

14 The Second Amended District Court Complaint further alleged that
15 New Century unlawfully transferred the Secured Claim in March 2007,
16 on the eve of its bankruptcy filing. It alleged that Ocwen was
17 either the original assignee of the Secured Claim or was the loan
18 servicer for the assignee. As such, it alleged, Ocwen was liable for
19 the misconduct by New Century and its brokerage subsidiary.

20 The Order granting Ocwen's motion for judgment on the pleadings
21 and denying the Debtor's request for leave to file a third amended
22 complaint found that, shortly before New Century's bankruptcy, the
23 Secured Claim was transferred to a third party other than Ocwen and
24 that Ocwen acquired the servicing rights for the Secured Claim. It
25 recited that the Debtor's original complaint asserted four claims for
26 relief: (1) Fraudulent Misrepresentation, (2) Truth in Lending Act

1 ("TILA"), (3) Federal Real Estate Settlement Procedures Act
2 ("RESPA"), and (4) Section 17200 of the California Business and
3 Professions Code ("B & P Code"). It recited that the District Court
4 granted the defendants' first motion to dismiss with leave to amend.

5 The Order further stated that the prior complaint (the "First
6 Amended District Court Complaint") realleged the original four causes
7 of action and added claims for Negligence and Professional
8 Malpractice, and Negligent Misrepresentation. The District Court
9 granted the defendants' second motion to dismiss in part, dismissing
10 the claims under TILA, RESPA, and for negligence and professional
11 malpractice, again with leave to amend. The B & P Code claim was
12 dismissed on the ground that it sought an improper remedy. The
13 District Court declined to dismiss the Debtor's fraud claim at that
14 time.

15 The Second Amended District Court Complaint alleged the same
16 claims as the First Amended District Court Complaint. The defendants
17 again moved to dismiss and the Debtor responded by filing a request
18 for leave to file a third amended complaint (the "Third Amended
19 District Court Complaint"). The Order addressed each of the claims
20 asserted in the Second Amended District Court Complaint separately.

21 With respect to the TILA claim, the Order noted that, as Ocwen
22 argued in support of its motion to dismiss, TILA exempts loan
23 servicers. While the District Court granted leave to amend this
24 claim with respect to the other defendant, the leave to amend did not
25 apply to the claim against Ocwen.
26

1 With respect to the RESPA claims, which alleged the failure of
2 New Century to give proper notice of the assignment, the Order noted
3 that the District Court previously held that defendants could not be
4 held liable for New Century's failure to give proper notice. Since
5 RESPA also requires the assignee to give notice of the assignment,
6 the District Court gave the Debtor leave to amend the claim to allege
7 that defendants had not given the notice they were required to
8 provide. The Order noted that neither the Second Amended District
9 Court Complaint nor the proposed Third Amended District Court
10 Complaint contained such an allegation. In addition, defendants
11 alleged that they had given the required notice and provided the
12 District Court with a copy of the notice.

13 With respect to the claims for intentional and negligent
14 misrepresentation, the Order noted that, in dismissing the First
15 Amended District Court Complaint with leave to amend these claims,
16 the Court had found that all of the alleged misrepresentations were
17 made before the assignment of the loan. In order to hold the
18 defendants liable for the misrepresentations, the complaint would
19 have had to allege that defendants were closely connected to New
20 Century and its brokerage subsidiary. The Second Amended District
21 Court Complaint failed to make any such allegations. The District
22 Court noted in a footnote that the proposed Third Amended District
23 Court Complaint also failed to contain any such allegations.
24 Moreover, the Order noted that the allegations of misrepresentations
25 were insufficiently specific.
26

1 With respect to the claims for Negligence and Professional
2 Malpractice, the Order noted that, in dismissing the First Amended
3 District Court Complaint, the District Court had observed that no
4 relationship between the Debtor and the defendants was alleged that
5 would give rise to a duty, the breach of which would give rise to a
6 claim for negligence or professional malpractice. The Second Amended
7 District Court Complaint did not remedy this deficiency. Again, in
8 a footnote, the District Court noted that the proposed Third Amended
9 District Court Complaint abandoned this claim.

10 With respect to the B & P Code claim, the Order noted that the
11 District Court previously dismissed this claim based on the Debtor's
12 prayer for an improper remedy, but permitted the claim to be amended
13 to permit a prayer for a proper remedy. However, the success of the
14 claim depended on the Debtor asserting viable claims against Ocwen
15 under RESPA and for intentional and negligent representation. The
16 Second Amended District Court Complaint failed to assert such a
17 claim. Thus, the B & P Code claim was also insufficient regardless
18 of the remedy sought.

19 Addressing the Debtor's request for leave to file a Third
20 Amended District Court Complaint, the District Court noted that the
21 Third Amended District Court Complaint proposed to add claims for
22 fraudulent conveyance, civil conspiracy, violation of the Fair Credit
23 Reporting Act ("FCRA"), violation of the Lenders and Servicers
24 Licensing Act ("LSLA"), breach of fiduciary duty in servicing the
25 Secured Claim, and quiet title. The District Court denied the
26 Debtor's request for leave to file the Third Amended District Court

1 Complaint, concluding that permitting the Debtor to allege these new
2 causes of action would be futile.

3 With respect to the claim for fraudulent conveyance, the
4 District Court found that the proposed Third Amended District Court
5 Complaint failed to state a viable claim. The District Court noted
6 that a claim to avoid a fraudulent conveyance seeks to undo a
7 transfer by a debtor to shield property from creditors. The
8 fraudulent conveyance alleged by the proposed Third Amended District
9 Court Complaint was the transfer of the Secured Claim by New Century
10 to defendants. Among other reasons stated, the District Court found
11 that the claim alleged was not viable because the Debtor was not a
12 creditor with standing to bring such a claim.

13 With respect to the claim for civil conspiracy, the Order noted
14 that the proposed Third Amended District Court Complaint alleged that
15 the defendants conspired to deprive the Debtor of her right to equal
16 protection in that subprime lenders have routinely preyed on minority
17 borrowers. The Order recited the statutory provision upon which such
18 a claim is necessarily based: i.e., 42 U.S.C. § 1985(3). It noted
19 that the allegations underlying the Debtor's claim for civil
20 conspiracy in the proposed Third Amended District Court Complaint
21 were conclusory, containing no specific facts demonstrating that
22 subprime lenders have preyed on minorities in general or on her in
23 particular. Additionally, the claim did not allege that the
24 defendants conspired with New Century or its subsidiary brokerage
25 when the loan was made.
26

1 With respect to the claim for the FCRA violation, the Order
2 notes that, in the proposed Third Amended District Court Complaint,
3 the Debtor alleged that the defendants violated FCRA by making
4 negative credit reports within 60 days of acquiring her loan. The
5 District Court concluded that the allegations of the proposed Third
6 Amended District Court Complaint were insufficiently specific to
7 state a claim under FCRA and that, given the Debtor's litigation
8 history, it would be futile to allow her to amend this claim further.

9 With respect to the claim for violation of LSLA, the Order noted
10 that the proposed Third Amended District Court Complaint alleged that
11 defendants violated the LSLA because she never received copies of the
12 closing documents on her loan as well as other documents required to
13 be provided when a loan secured by a mortgage is made. The District
14 Court noted that this type of claim applies to the loan originator--
15 i.e., New Century--not to an entity that subsequently acquired the
16 Secured Claim or its servicer.

17 With respect to the third party claim for breach of fiduciary
18 duty, the Order noted that the proposed Third Amended District Court
19 Complaint alleged that defendants breached their fiduciary duty to
20 her by seeking to benefit from loan servicing without providing any
21 loan servicing. The District Court noted that the Debtor previously
22 made similar allegations, although she styled them as claims for
23 negligence and professional malpractice. The District Court
24 dismissed the claims when previously alleged on the ground that the
25 allegations did not establish that the defendants owed the Debtor a
26 duty of care. The Order stated that the same rationale applies to

1 the claim asserted as a breach of fiduciary duty. The District Court
2 concluded that it would be futile to allow the Debtor to amend the
3 Second Amended District Court Complaint to add this claim.

4 Finally, with respect to the quiet title claim, the Order
5 recited the elements of such a claim. The District Court found that
6 the claim as alleged in the proposed Third Amended District Court
7 Complaint was deficient in two respects. First, it failed to allege
8 any adverse claim to ownership of the Property. Second, the proposed
9 Third Amended District Court Complaint stated, in conclusory fashion,
10 that defendants wrongfully claimed an interest in the Property,
11 without specifying what interest was claimed or how it was adverse to
12 her ownership claim. For the reasons stated earlier, the District
13 Court found that it would be futile to allow the Debtor to amend the
14 Second Amended District Court Complaint by adding this claim.

15 In conclusion, the Order indicated that the Debtor's request for
16 leave to file the proposed Third Amended District Court Complaint
17 would be denied. On the same date the Order was signed, the Court
18 signed a judgment, granting the motion for judgment on the pleadings
19 in favor of Ocwen and the other defendant and dismissing the District
20 Court Action with prejudice.

21 **DISCUSSION**

22 Ocwen moves to dismiss the claims asserted in the Complaint on
23 the ground that, based on the rulings made in the District Court
24 Action, they are barred by the doctrine of res judicata. Such a
25 dismissal would necessarily be with prejudice. Ocwen opposes the
26

1 Debtor's motion for leave to file the Second Amended Bankruptcy Court
2 Complaint on the same ground.

3 Res judicata is a phrase used to refer to two distinct
4 doctrines: i.e., claim preclusion and issue preclusion. Taylor v.
5 Sturgell, 128 S. Ct. 2161, 2171 (2008). The doctrine upon which
6 Ocwen relies is claim preclusion. Under the doctrine of claim
7 preclusion, "a final judgment on the merits of an action precludes
8 parties or their privies from relitigating issues that were or could
9 have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94
10 (1980). There are three elements to a successful claim preclusion
11 defense: (1) an identity of claims, (2) an identity of parties, and
12 (3) a final judgment on the merits. Tahoe Sierra Preservation
13 Council, Inc. V. Tahoe Regional Planning Agency, 322 F.3d 1064, 1077
14 (9th Cir. 2003). Each of these elements is satisfied here. Thus,
15 Ocwen's motion to dismiss should be granted.

16 For purposes of claim preclusion, claims are identical when the
17 claims asserted in the two actions arise from the "same transactional
18 nucleus of facts." Id., at 1078. Two actions arise from the "same
19 transactional nucleus of facts" if they are related in time, space,
20 and origin. A party may not avoid the preclusive effect of claim
21 preclusion "by attaching a different legal label to an issue that
22 has, or could have, been litigated" in the previous action. Id. at
23 1077-78.

24 In this proceeding, as summarized above, the Complaint clearly
25 asserts claims that arose from the same transactional nucleus of
26 facts as those asserted in the District Court Action. Both actions

1 assert claims arising from alleged misconduct by New Century and its
2 brokerage subsidiary, for which Ocwen is asserted to be liable, and
3 claims arising from alleged misconduct by Ocwen itself in connection
4 with the Secured Claim. It is of no consequence that the Debtor may
5 be asserting new theories of recovery in the proceeding herein.
6 Moreover, she is not. Each of the three claims for relief included
7 in the Complaint were at one time or another asserted, or proposed to
8 be asserted, in the District Court Action. Therefore, the identity
9 of claims element of claim preclusion is satisfied.

10 The other two elements are even more clearly satisfied. The
11 Debtor and Ocwen were parties to the District Court Action.
12 Moreover, the judgment entered in the District Court Action,
13 dismissing the Second Amended Complaint with prejudice, is final.
14 The Debtor did not appeal it.

15 The Debtor's opposition to Ocwen's motion to dismiss raises no
16 serious issues. She attaches rulings from a separate district court
17 action that she filed against a different defendant in which she
18 obtained a default judgment. She also attaches one of the orders in
19 the District Court Action, granting in part and denying in part one
20 of defendants' prior motions to dismiss.

21 The Debtor blames her lack of success in the District Court
22 Action on the attorney representing her at the time. The time for
23 challenging the ruling by the District Court is past, and this is the
24 wrong court in which to do so. The Debtor does not dispute that the
25 claims asserted in this proceeding were, or could have been, asserted
26 in the District Court Action and arise from the same transactional

1 nucleus of facts. Neither does she dispute that the same parties
2 were involved or that judgment entered therein is final. As a
3 result, the doctrine of res judicata or claim preclusion bars the
4 assertion of the claims in the Complaint.

5 The same rationale applies to the Debtor's motion for leave to
6 file the Second Amended Bankruptcy Court Complaint. Some of the
7 claims asserted in the proposed Second Amended Bankruptcy Court
8 Complaint were asserted in the District Court Action; some were not.
9 However, all are based on the same transactional nucleus of facts.
10 Therefore, the doctrine of claim preclusion bars their being asserted
11 now in this court. The Debtor's attempt to distinguish the factual
12 nature of the claims alleged in the proposed Second Amended
13 Bankruptcy Court Complaint is of no avail. Claim preclusion bars
14 relitigation of claims that were *or could have been* asserted in the
15 prior action.

16 CONCLUSION

17 The claims asserted in the Complaint are barred by res judicata
18 based on the final judgment in the District Court Action.
19 Consequently, Ocwen's motion to dismiss will be granted with
20 prejudice. For the same reason, the Debtor's motion for leave to
21 file the Second Amended Bankruptcy Court Complaint will be denied.
22 Counsel for Ocwen is directed to submit a proposed form of order in
23 accordance with this decision.

24 END OF DOCUMENT
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

COURT SERVICE LIST

Leslie Patrice Barnes Marks
3099 Sutter Street
Oakland, CA 94602-2840

Eric D. Houser
Law Offices of Houser and Allison
9970 Research Dr.
Irvine, CA 92618